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No. 83-1171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,

Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Enacted on November 9, 1978, the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. V 1981) ("NGPA"), prescribed "maximum lawful prices" for all "first sales" of natural gas, effective December 1, 1978. Congress expressed these ceiling prices in dollars and cents "per million Btu's". The court of appeals vacated a rule of the Federal Energy Regulatory Commission ("Commission"), which interprets the NGPA and prescribes a method for accurately determining the Btu content of natural gas sold and delivered in first sales for purposes of applying these congressionally-established ceiling prices.

The questions presented are:

1. Whether the court of appeals violated established principles of judicial review (i) by failing to limit its review to whether the Commission's interpretation of the NGPA is reasonable and (ii) by substituting its own view that, in applying NGPA ceiling prices, the Commission must use a measurement procedure which understates the number of Btu's actually delivered and thereby effectively reduces the ceiling prices established by Congress.

2. Whether the court of appeals erred in disregarding the authority vested in the Commission by Sections 501(a) and (b) of the NGPA to define terms and to administer, implement and enforce the statute.

PARTIES TO THE PROCEEDINGS

Petitioners in this case*, all of whom participated in the case below, are: Aminoil Inc.; Amoco Production Com-

* In accordance with Rule 28.1, the list of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates is included at App. 224a-235a.

pany; ARCO Oil and Gas Company, Division of Atlantic Richfield Company; Chevron U.S.A. Inc.; Conoco Inc.; Exxon Corporation; Getty Oil Company; Gulf Oil Corporation; Mobil Oil Corporation; Mobil Oil Exploration and Producing Southeast, Inc.; Mobil Producing Texas and New Mexico, Inc.; Pennzoil Company; Phillips Petroleum Company; Phillips Oil Company; Placid Oil Company; Shell Oil Company; Sun Exploration and Production Company; The Superior Oil Company; Tenneco Oil Company; Texaco Inc.; and Union Oil Company of California.

In addition, the parties below were: the Federal Energy Regulatory Commission; Associated Gas Distributors; El Paso Natural Gas Company; General American Oil Company of Texas (now Phillips Oil Company); Houston Oil & Minerals Corporation; Interstate Natural Gas Association of America; Laclede Gas Company; Lone Star Gas Company; Louisiana Land and Exploration Company; Michigan Wisconsin Pipeline Company; Mississippi River Transmission Corporation; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Panhandle Eastern Pipe Line Company; Texas Gas Transmission Corporation; Transcontinental Gas Pipe Line Corporation; Trunkline Gas Company; United Gas Pipe Line Company; and Valero Transmission Company.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Exxon Corporation, *et al.* (Petitioners), an *ad hoc* group of natural gas producers listed at the conclusion, petition for a writ of certiorari to review the August 9, 1983, decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. A) is reported at 716 F.2d 1 (D.C. Cir. 1983). The orders denying rehearing and rehearing *en banc* (App. 153a, 154a-155a) are not reported.

The orders of the Federal Energy Regulatory Commission (App. B) are reported as follows: Order No. 93, 45 Fed. Reg. 49077 (July 23, 1980); Order No. 93-A, 15

F.E.R.C. ¶ 61,075, at 61,169 (1981); Order Denying Applications for Rehearing of Order No. 93-A and Limited Stay of Order Nos. 93 and 93-A, 16 F.E.R.C. ¶ 61,077, at 61,144 (1981); Order Vacating Order Denying Rehearing of Order No. 93-A and Limited Stay of Order Nos. 93 and 93-A, 16 F.E.R.C. ¶ 61,142, at 61,324 (1981); Order Granting Partial Stay of Order Nos. 93 and 93-A Pending Further Order, 16 F.E.R.C. ¶ 61,143, at 61,325 (1981); and Order Vacating Partial Stay and Amending Regulations, 47 Fed. Reg. 614 (January 6, 1982). The pertinent portions of the "Interim Regulations" promulgated by the Commission (App. 93a-118a) are reported at 43 Fed. Reg. 56448-56459, 56533-56536, 56544, 56546, 56550 (December 1, 1978).

JURISDICTION

The judgment of the court of appeals (App. 147a-152a) was entered on August 9, 1983. The orders denying petitions for rehearing and suggestions for rehearing *en banc* (App. 153a, 154a-155a) were entered on October 19, 1983.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute upon which the court of appeals' decision is based is the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. V 1981), the relevant excerpts of which appear at App. 159a-183a. The Commission's regulation (18 C.F.R. § 270.204) appears at App. 188a. Excerpts of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1976 & Supp. V 1981), and of the Federal Power Act, 16 U.S.C. §§ 791a-825r (1976 & Supp. V 1981), appear at App. 184a-186a and App. 187a, respectively.

STATEMENT

In enacting the Natural Gas Policy Act of 1978 ("NGPA")[1], Congress made a basic change in the way that regulated sales of natural gas are priced, shifting from a volumetric (Mcf) method of stating ceiling rates, which had been the practice of the Commission[2] under the Natural Gas Act of 1938 ("Gas Act")[3] to a heating value (Btu) method. This shift was an integral part of Congress' basic decision to abandon the cost-based, utility-type method of producer regulation, and instead to relate ceiling prices to the value of alternate fuels. The common denominator among natural gas, liquid petroleum fuels and coal is heating value.

Prior to the NGPA, the Commission had used a Btu measurement rule that understated the actual Btu content of the gas sold. After enactment of the NGPA, the Commission adopted a regulation to provide for an accurate determination of the Btu's sold. The court of appeals vacated this regulation.

A. Historical Background

Under the Gas Act, the Commission had established maximum rates for sales of natural gas in interstate commerce for resale by producers. These rates were determined on a cost-of-service basis; the estimated costs of finding and producing gas were divided by the estimated volume of gas to be produced, yielding a rate per unit of volume (*i.e.*, dollars per Mcf). App. 70a-72a. These volumetric rates were developed first on an individual company cost-of-service basis, thereafter on an "area rate" basis and

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[1] 15 U. S. C. §§ 3301-3432 (Supp. V 1981).

[2] The Federal Power Commission and its successor, the Federal Energy Regulatory Commission, are each referred to herein as "Commission," as may be appropriate.

[3] 15 U. S. C. §§ 717-717w (1976 & Supp. V 1981).

later on a "national rate" basis using composite, industry-wide cost data.[4]

While many producer contracts for such sales provided that the prices would be adjusted to reflect the Btu content of the gas, the Commission did not allow any price adjustments for Btu content in determining ceiling rates until 1965.[5] Thereafter, the Commission altered these adjustments over time, eventually permitting a proportional increase in the ceiling rates, expressed in amounts per Mcf, for gas containing more than 1,000 Btu's per cubic foot, and requiring a proportional decrease for gas with a lower Btu content.[6] Notwithstanding these Btu adjustments in establishing volume-based rates, the Commission never attempted to reflect precisely the value of the Btu content of the gas. *Cf., e.g., National Rates, supra,* 56 F.P.C. at 578-584, 612-622; *id.* at 2765-2769, 2773-2774.

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[4] *Public Service Commission* v. *Mid-Louisiana Gas Co.*, Nos. 81-1889, *et al.*, slip op. at 8-11 (June 28, 1983); *see also, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 755-757, 759-764, 800-813 (1968); *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 288-289 & n.3, 292-293 & n.7, 296-300, 301-306 (1974); *American Public Gas Association* v. *FPC*, 567 F.2d 1016, 1027-1028 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *see, also* App. 70a-72a.

[5] *Texaco Inc.*, 33 F.P.C. 1228, 1236-1238 (1965) *reh. denied*, 34 F.P.C. 129, *clarified*, 34 F.P.C. 1098 (1965).

[6] *National Rates For Jurisdictional Sales Of Natural Gas*, 56 F.P.C. 509, 602, *reh. denied*, 56 F.P.C. 2698, 2807-2808 (1976), *aff'd sub nom. American Public Gas Association* v. *F.P.C.*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

In earlier cases, the Commission had allowed proportional upward adjustments for gas containing more than 1,050 Btu's per cubic foot and required downward adjustments for gas containing less than 1,000 Btu's per cubic foot. *E.g., Permian Basin Area Rate Cases*, 390 U.S. at 762, 809-810 & n.91; *Area Rate Proceeding (Southern Louisiana Area)*, 46 F.P.C. 86, 143-144, *reh. denied*, 46 F.P.C. 633 (1971), *aff'd sub nom. Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974).

Thus, the Commission's rates were never expressed on a "per million Btu" ("MMBtu") basis.

Although the adjustments for Btu content varied over time, the Commission required producers to determine Btu content on a "saturated" basis for purposes of applying these Btu adjustments,[7] because the Commission required the interstate pipelines to report the Btu content of purchased gas on a "saturated" basis in their annual reports.[8] *Texaco Inc., supra,* 33 F.P.C. at 1236-1237.[9] As explained more fully in the "Technical Background" below, the "saturated" (or "wet") Btu determination overstates the amount of water vapor actually contained in gas sold and delivered, and, concomitantly, understates the Btu content of the gas. *E.g.* App. 10a, 68a-69a.

Intrastate sales and producers' direct sales to consumers in interstate commerce were not subject to regulation under

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[7] Many contracts for such regulated sales, and for unregulated sales discussed below, however, provided that Btu content would be determined at, or corrected to reflect, actual delivery conditions. *See, e.g.,* American Gas Association, Gas Measurement Committee Report No. 4A, *Natural Gas Contract Measurement And Quality Clauses,* 7, 19 (1st ed. 1971) (App. 199a, 212a) (hereinafter "AGA Report 4A"); *cf., e.g.,* App. 60a. The contracts for unregulated sales, and for regulated sales made at prices below the ceiling rates, were permitted to operate according to their terms.

[8] The Commission, however, did not require the interstate pipelines to determine Btu content on a "saturated" basis in establishing the rates at which they resold gas to their customers. The Commission permitted these pipelines to determine the Btu content of gas which they resold on a "dry" basis for ratemaking purposes. At the present time, 19 of the 32 major interstate pipelines use the "dry" test to determine the Btu content of the gas they sell.

[9] Methods then actually used in measuring the Btu content of gas purchased by the interstate pipelines varied widely. *Texaco Inc., supra,* 33 F.P.C. at 1244.

the Gas Act. For this reason, the parties to such sales were not required to measure Btu content on a "saturated" basis.[10] In such unregulated sales, the sales contract determined the method of measuring Btu content. Many of these unregulated contracts in effect before the enactment of the NGPA provided that Btu content measured at saturated conditions be adjusted to reflect the actual Btu content of the gas as delivered.

On November 9, 1978, the NGPA was enacted, effective December 1, 1978. In this statute, Congress exercised its legislative authority, theretofore delegated to the Commission under the Gas Act, to establish new maximum lawful prices for first sales of natural gas. The NGPA states these ceiling prices for the first sales of natural gas in dollars and cents "per million Btu's." The NGPA defines "Btu" as a "British thermal unit" (§ 2(30), 15 U.S.C. § 3301(30)), and separately defines "Mcf" (§ 2(29), 15 U.S.C. § 3301 (29)). The NGPA also vests the Commission with the authority to "administer" the NGPA and to issue rules and orders (§ 501(a), 15 U.S.C. § 3411(a)), and "to define, by rule, accounting, technical, and trade terms used in [the NGPA]" (§ 501(b), 15 U.S.C. § 3411(b)).

On December 1, 1978, the Commission promulgated its "interim regulations." Section 270.204 of the interim regulations describes a test standard for measuring the number of Btu's contained in a cubic foot of gas under certain

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[10] Before the passage of the NGPA, only one of the major producing states regulated the prices which producers could charge for natural gas sold in intrastate commerce. This state, New Mexico, permitted the prescribed base price per Mcf to be adjusted to reflect the "Btu content" of the gas. New Mexico "Natural Gas Pricing Act," 1977 N. Mex. Laws, Ch. 73, § 4F, amended, 1981 N. Mex. Laws, Ch. 317, codified, N. Mex. Stat. Ann. § 62-7-3F (Michie 1982 Cumulative Supp.). New Mexico allows the Btu content of natural gas sold subject to its statute to be determined on the basis of the Btu's actually delivered.

"standard" laboratory conditions. App. 36a, 117a-118a. One test condition prescribed in Section 270.204 is that the Btu content be measured with the gas "saturated with water vapor". App. 117a.

Recognizing the short time between the notice and promulgation of its interim regulations, "the Commission solicit[ed] comments on all aspects of these regulations" and stated its intent to review the regulations and make changes deemed appropriate. App. 113a. These additional comments, including those filed by Petitioners, were considered by the Commission before it issued final regulations. In Order No. 93 (App. 35a-42a) issued July 16, 1980, the Commission promulgated one of these final regulations. The Commission stated in Order No. 93 that Section 270.204 merely described a test standard for measuring the number of Btu's contained in a cubic foot of gas under "standard" test conditions. The Commission made clear that the results obtained under the described saturated test conditions "must be converted to figures that reflect the actual condition of gas on delivery to properly price the gas." App. 38a.

In Order No. 93-A (App. 42a-77a), the Commission denied requests for rehearing of Order No. 93. The Commission held that the number of MMBtu's sold in a first sale is "the number of MMBtu's actually delivered" (App. 45a, 54a, 56a), and that the correction to actual delivery conditions should be applied effective as of December 1, 1978, the effective date of the NGPA (App. 46a n.7, 63a-64a). The Commission noted that in contrast to the Commission's volumetrically-based pricing scheme under the Gas Act, the ceiling prices established by Congress in the NGPA are energy-based, *i.e.*, expressed in terms of a price for each million Btu's of energy content of gas being sold. App. 50a, 56a-57a, 70a-73a. For this reason, the Com-

mission concluded that the correction to reflect the actual energy content of the gas stream had to be applied because under the NGPA, energy is the ceiling price determinant. App. 54a, 59a.

On August 9, 1983, the court of appeals vacated the Commission's rule, finding that Congress had implicitly adopted the "saturated" (or "wet") method of Btu measurement set out in the Commission's Gas Act regulations. App. 26a, 32a-33a. The court of appeals required use of this method, but conceded that the Commission's Gas Act regulations yielded an inaccurate and understated Btu content (App. 10a) and that neither the NGPA nor its legislative history contained any express provision requiring such an understatement (App. 22a-23a.). The court of appeals further found that because this measurement standard had been implicitly adopted by Congress, the Commission now lacks discretion to change, even prospectively, the method of measuring Btu content even though the Commission had discretion under the Gas Act to prescribe this method in the first place. App. 32a-33a.

B. Technical Background

In practice, the number of million Btu's[11] sold is determined by measuring both the total volume ("Mcf's")[12] and

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[11] A British thermal unit ("Btu"), a commonly used unit of energy or heating value, is the amount of heat required to raise the temperature of one pound of water one degree Fahrenheit. 18 C.F.R. § 270.102(b)(2) (1983); Williams and Meyers, *Manual of Oil and Gas Terms*, 74 (5th ed. 1981) ("Btu").

The term "MMBtu" means one million Btu's. 18 C.F.R. § 270.102 (b)(3) (1983).

[12] The volume of natural gas is measured in "Mcf's." The NGPA defines "Mcf" as "1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch (absolute) ["psia"] and a temperature of 60 degrees Fahrenheit." NGPA § 2(29), 15 U.S.C. § 3301(29).

the Btu content [13] of the gas. AGA Report 4A at 7 (App. 199a). The seller's revenues are determined by multiplying the Btu content by the volume of gas delivered and then multiplying that product by the applicable maximum lawful price. App. 44a n.5.

The Btu content of any given volume of natural gas depends on the particular mix of combustible hydrocarbon gases (*e.g.*, methane, butane and propane) and non-combustible gases (*e.g.*, water vapor and carbon dioxide), in that volume (App. 9a, 67a; AGA Report 4A at 7, 10-11 (App. 199a, 202a-203a)), and the temperature and pressure at which the volume and Btu content of gas are measured (App. 67a-68a; AGA Report 4A at 5-6, 7 (App. 198a, 199a)).[14] Because water vapor is not combustible, its presence reduces the Btu content of natural gas by displacing combustible hydrocarbons in a given Mcf of gas. App. 10a, 54a, 66a, 67a, 69a.

The natural gas industry uses different test procedures for measuring Btu content.[15] All of the test procedures are valid as long as the test conditions, including whether the gas was "saturated" with water vapor or "dry", are stated and adjusted, as necessary, to reflect the actual state of the gas being delivered.

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[13] The "Btu content" is the number of Btu's per cubic foot (or MMBtu's per Mcf) of gas at a specified pressure and temperature. *Texaco Inc., supra*, 33 F.P.C. at 1239 (¶D); 18 C.F.R. § 270.204 (b) (1983).

[14] Both pressure and temperature significantly affect the number of molecules present in a unit volume of gas. App. 67a-68a.

[15] AGA Report 4A at 7 (App. 199a) ("The trend appears to be toward the expression of the Btu [content] on an assumed dry basis as opposed to the antiquated water saturated basis since currently the actual conditions of fuel gas transported to market in high pressure pipelines is essentially dry."); *see also, id.* at 19 (App. 212a.); *Standards of Calorimetry for Gaseous Fuels*, Case No. 4720, General Order No. 58-B at 2 §§ 3f and g (Cal. PUC Dec. 28, 1955; effective Jan. 7, 1956) (App. 219a).

The terms "wet" rule and "dry" rule, which were used by the court of appeals to refer to the Commission's Gas Act and NGPA rules, respectively, are misleading in the sense that they suggest that the two rules simply describe different technical methods to measure gas. This is not correct. Under the so-called "dry" rule, the Commission adopted a two-step procedure under which Btu content is first determined using standard laboratory test conditions and then adjusted to reflect the actual Btu content of the gas as delivered.[16] The so-called "wet" rule consists of only the first step and does not apply the correction needed for an accurate determination of the Btu content of the gas being sold.

If the Btu content is measured on a "saturated" (or "wet") basis, the laboratory test sample of gas contains substantially more water vapor than the gas does when it is delivered to the purchaser. App. 68a-69a. This "saturation" is achieved by bubbling the test sample of gas through water. This bubbling changes the composition of the test sample by adding water vapor and displacing Btu-producing hydrocarbons. The added water vapor is equivalent to approximately 820 pounds of water vapor per one million cubic feet ("MMcf") of gas. App. 69a. This amount of

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[16] The court of Appeals' description of the Commission's procedure under the NGPA for determining the Btu content of gas as the "dry rule" is a misnomer. Under the Commission's procedure, the Btu content is measured with the test sample of gas saturated with water vapor, then the test result is corrected to reflect actual delivery conditions. For example, if the gas were saturated with water vapor at the delivery conditions, the Commission's procedure would determine the Btu content of the gas reflecting the actual water vapor content of the gas. Thus, the Commission's procedure yields an accurate determination of the Btu content of gas regardless of the amount of water vapor in the gas. The court of appeals, however, prohibited the use of the second step of this procedure, which corrects the test measurement result for actual delivery conditions.

water vapor far exceeds the amount of water vapor which is (i) permitted by most gas sales contracts (App. 60a, 68a-69a, AGA Report 4A at 12-13, 20 (App. 205a, 213a)), and (ii) physically contained in the gas at typical delivery conditions (App. 54a n.16). At typical delivery conditions it is physically impossible for the gas to contain even 70 pounds of water vapor per MMcf. App. 58a, 69a, 72a, 77a. Indeed, if gas were delivered at typical pipeline pressures with the water vapor content required by the laboratory test, the water vapor would condense, filling the pipeline with water and preventing delivery of the gas. *See* App. 66a.

The addition of such substantial quantities of water vapor to the test sample thus produces a "measured" Btu content which is less than the Btu content of the gas which the purchaser actually receives. App. 68a-69a, 73a. If this "measured" Btu content is not corrected to reflect the actual delivery conditions, the purchaser pays for fewer Btu's than he receives and the seller is paid for fewer Btu's than he delivers.

If the test results are to reflect correctly the actual number of Btu's delivered to the purchaser, the number of Btu's measured by the laboratory test must be corrected to offset the water vapor added to the sample to perform the test. *See* App. 68a-69a, 73a. The Commission so found in the orders below, stating:

> The Commission is aware that the water vapor content or pressure of the gas when tested may be different . . . than the conditions that obtain when the gas is delivered. Therefore, the results obtained under test conditions, be they those in the rule or others, must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas.[17]

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[17] App. 38a.

The court of appeals conceded that the "saturated" (or "wet") test, which the Commission had used under the Gas Act, resulted in an inaccurate measurement of the Btu's actually delivered to the purchaser. That court said:

> This rule was known as the "wet" rule because it required the gas sample to be saturated with water vapor at a temperature and pressure combination where the capacity of natural gas to absorb water vapor is markedly higher than that existing at the temperature and pressure conditions under which most natural gas is sold. In practical effect, therefore, the wet rule tended to overstate water vapor content for gas which, when actually delivered, was neither saturated with water vapor nor delivered at the "standard" temperature or pressure. *See* FERC Order 93-A, Technical Appendix, *reprinted* in JA 63. This overstated water vapor content, in turn, caused an understatement in the number of Btu's assumed to be in the test sample of natural gas.[18]

SUMMARY OF REASONS FOR GRANTING THE PETITION

Although the court of appeals acknowledged that the Commission's Gas Act "wet" rule yields an inaccurate and understated Btu content determination, that court nevertheless held that the NGPA required the Commission to preserve this rule and precluded the Commission from adopting a rule to correct the "wet" measurement to reflect actual Btu content of gas at actual conditions. The action of the court of appeals is founded on two erroneous predicates.

First, the court of appeals erred in determining that it could substitute its interpretation of the NGPA for the reasonable interpretation of the Commission that the NGPA's ceiling prices "per million Btu's" may be collected for the

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[18] App. 10a.

MMBtu's actually delivered. The court of appeals substituted its construction of the statute for that of the Commission so as to understate the MMBtu's actually delivered, notwithstanding the absence of any express guidance in either the statute or the legislative history to support the court's own reading. Thus, the court of appeals erred by failing to limit its review to whether the Commission's interpretation is reasonable, in conflict with the guidelines for judicial review set by this Court.

Second, the court of appeals erred in substituting its judgment for the Commission's exercise of its congressionally-delegated authority. If Congress did not address the issue of Btu content measurement by stating the NGPA's ceiling prices per MMBtu's, the Commission is vested with the authority to resolve the question. Under Section 501 of the NGPA, the Commission is authorized "to define, by rule, accounting, technical, and trade terms" used in the NGPA, and to administer, implement and enforce the statute. Accordingly, if the matter were left unresolved by Congress, the Commission, not the court of appeals, is vested with the authority to devise a reasonable rule. Rather than deferring to the Commission's reasonable exercise of its authority, the court of appeals vacated the Commission's rule, which the court criticized as "hyper-accurate" (App. 30a), and required the Commission to substitute in its place a measurement rule which the court of appeals admitted is inaccurate. App. 10a.

The result of the court of appeals' decision is to prevent producers from being paid for all of the Btu's which they deliver, effectively reducing the ceiling prices established in the NGPA by the amount of the inaccuracy. This inaccuracy is applicable to virtually every first sale of regulated gas sold and delivered in the United States since December 1, 1978. Accordingly, the financial importance of this case is enormous.

Based on the precedents of this Court governing the proper standards of judicial review of agency actions, the court of appeals decision should be reversed.

REASONS FOR GRANTING THE PETITION

I. In Vacating The Commission Orders In This Case, The Court Of Appeals Erred By Substituting Its Interpretation Of The NGPA For The Commission's Reasonable Interpretation.

A. The Commission's Interpretation Is In Accord With Precedent Of This Court.

As this Court previously has observed, Congress in enacting the NGPA "fundamentally" and "comprehensively" altered the natural gas ceiling price structure. *Public Service Commission* v. *Mid-Louisiana Gas Co.*, Nos. 81-1889, *et al.*, slip op. at 1-2, 11-14 (June 28, 1983). In the NGPA, Congress itself established ceiling prices,[19] withdrawing from the Commission the authority to set ceiling rates for first sales under the just and reasonable standard of the Gas Act.[20]

The court of appeals found that Congress implicitly adopted the Commission's Gas Act method of measuring Btu content. App 26a, 33a. Based on this finding, that

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[19] All "first sales" were originally subject to price ceilings. Certain "first sales" were deregulated on November 1, 1979, under Sections 107(c)(1)-(4) and 121, 15 U.S.C. §§ 3317(c)(1)-(4) and 3331.

[20] Under the NGPA, the Commission retained authority to *increase* ceiling prices for certain categories of gas if found just and reasonable. 15 U.S.C. §§ 3314(b)(2), 3316(c), 3319(b)(2). The Commission was given no authority, however, to decrease these prices. *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The Commission is also given the authority to establish incentive prices for certain high cost gas. 15 U.S.C. § 3317(c)(5).

court vacated the Commission's two-step procedure under which Btu content is first measured at "standard" laboratory conditions and then corrected to reflect the actual water vapor and energy content of the gas as delivered.[21]

This Court previously has rejected an attempt to engraft requirements adopted by the Commission under the Gas Act onto the NGPA where such requirements are incompatible with the new comprehensive ceiling price scheme adopted by Congress in the NGPA. In *Public Service Commission* v. *Mid-Louisiana Gas Company, supra*, this Court had before it a Commission order which had construed the NGPA as excluding certain pipeline production from coverage by the NGPA's ceiling prices. The Commission's reading of the statute was based on its view that the NGPA had not mandated a change from the Commission's regulation of pipeline production under the Gas Act. This Court rejected the Commission's interpretation as contrary to the "comprehensive" ceiling price structure in the NGPA that replaced the Commission's Gas Act rates and practices. This Court concluded that in the absence of a clear directive in the NGPA to continue the Commission's Gas Act regulation for pipeline production, no exclusion from the NGPA's ceiling prices could be implied.

The Commission's action here is consistent with this Court's reading of the NGPA articulated in *Mid-Louisiana*. The Commission declined to continue its Gas Act "wet" rule because that rule is incompatible with the NGPA's

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[21] Contrary to the apparent understanding of the court of appeals (App. 8a), the Commission in providing for this correction did *not* require a change in its Gas Act practice of measuring the heating value of gas at "standard" laboratory test conditions. Rather, the Commission determined that, if measured at "standard" test conditions, the Btu content must be corrected to reflect actual delivery conditions in order to give effect to the NGPA's energy-based ceiling prices.

new pricing scheme. In the absence of an express directive in the NGPA to preserve the prior Gas Act practice, the Commission properly declined to continue it.

B. The Commission's Interpretation Is Reasonable And In Accord With The Language and Legislative History Of The NGPA.

In providing for the determination of actual energy content under the NGPA, the Commission has given effect to the language of the statute that ceiling prices be established "per million Btu's."[22] As this Court has frequently admonished, statutory construction must begin "with the language of the statute itself."[23] And "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[24] In construing the language of the statute, it is presumed that "the legislative purpose is expressed by the ordinary meaning of the words used."[25]

The NGPA ceiling prices unequivocally apply "per million Btu's." Section 2(30) of the statute, defining "Btu", plainly affirms that Congress had no intention to deviate from the universally accepted meaning of the term as a specific — and accurately measurable — quantum of energy. Thus, the language of the NGPA sets natural gas ceiling

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[22] Sections 102 through 109 of the NGPA (15 U.S.C. §§ 3312-3319) establish ceiling prices "per million Btu's". For example, NGPA Section 102(b) establishes a maximum lawful price of "$1.75 per million Btu's in the case of April, 1977", and applies that ceiling price, in subsection (a), "to any first sale of natural gas" which is "new natural gas" or certain gas from old Outer Continental Shelf leases. See, 15 U.S.C. § 3312(a) & (b).

[23] *Howe* v. *Smith*, 452 U.S. 473, 480 (1981).

[24] *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[25] *Richards* v. *United States*, 369 U.S. 1, 9 (1962).

prices on the basis of a specific quantum of energy. These prices apply to nothing more and to nothing less.

The Commission concluded that these ceiling prices could be implemented in accordance with the statute only by a rule that accurately determines Btu content. There is no statutory support for any assertion that the ceiling prices apply to less than the actual number of Btu's delivered. A Commission regulation permitting natural gas sellers to overstate the number of Btu's actually sold and delivered through the artifice of a "measurement" rule would not survive judicial scrutiny. Such a rule would be a transparent circumvention of the ceiling prices established by Congress. Likewise, a rule understating the number of Btu's sold and delivered, such as that ordered by the court of appeals, is no less repugnant to the language of the NGPA.

The Commission's construction of the NGPA is supported by the legislative history. From the time the legislation was first proposed, the intent was to bring prices for newly discovered gas up to par with its commodity value. As Administration spokesman Dr. James Schlesinger testified before Congress during the early stages of deliberation:

> The thrust of the Administration's recommendation on new natural gas pricing is to abandon the concept of cost-based pricing, which made sense only when gas was a surplus product, and to adopt instead a rate structure predicated upon the commodity value of new gas. The commodity value pricing approach pegs the price of new natural gas to its most readily available substitute, oil.[26]

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[26] Hearings Before the Committee on Energy and Natural Resources, United States Senate, 95th Cong., 1st Sess., Publication No. 95-33 at 159 (May 3, 1977).

As the legislative history of the NGPA makes clear, to accomplish this goal ceiling prices were tied to the Btu equivalent price of alternative fuels. For example, the new natural gas price (ultimately covered by Section 102 of the NGPA) under the House version of the bill was "equal to the Btu equivalent to the average refiner acquisition cost of domestic crude oil", while in the Senate bill it was "equal to the 'current' Btu equivalent price of No. 2 fuel oil landed in New York City".[27]

The selection by Congress of a "million Btu's" as the NGPA's pricing unit was "inherent in the congressional intent to establish incentive prices based on the commodity value of alternative energy sources".[28] In order to ensure that natural gas is priced in relation to the Btu equivalent price of other fuels, the Commission properly provided that the pricing basis must be the actual number of MMBtu's delivered to the purchaser:

> Because of a very clear physical difference between natural gas and other fuels, true comparison can only be achieved by applying the prescribed maximum lawful price to the number of MMBtu's in a volume of gas at delivery conditions rather than to some theoretical quantity such as the number of MMBtu's at standard conditions. This is true because, unlike other fuels, which are either liquid or solid as opposed to gaseous, water vapor in natural gas displaces hydrocarbon compounds, resulting in a diminution of heating value of the natural gas.[29]

The inescapable conclusion is that the court of appeals' decision frustrates the statutory purpose to price gas according to its energy value.

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[27] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess., 67-68 (1978).

[28] App. 50a.

[29] App. 54a. The court of appeals admitted that the wet rule is inaccurate. App. 10a.

The Commission's interpretation of the NGPA is reasonable and should have been upheld. The court of appeals erred in refusing to follow the precedents of this Court, which make clear that, in interpreting a statute, a court is not free to substitute its interpretation for a reasonable interpretation by the agency charged with implementing that statute.

In *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*,[30] this Court recently outlined the deference that should be accorded the interpretation of an agency, like the Commission in this case, in which Congress has vested primary and substantial responsibility for administering and enforcing a statute. There, this Court stated that:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court .... To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.[31]

This Court also has stated "that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong [.]" *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S.

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[30] 454 U.S. 27 (1981).

[31] *Id.* at 39 (Citation omitted) *See also, Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U.S. 396, 408 (1961), where the Court stressed that deference is particularly appropriate when the interpretation is a contemporaneous construction of a statute " 'by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' "

367, 381 (1969). There are no compelling indications that the Commission's construction in this case is wrong. Applying this standard of review to the instant case mandates that the decision of the court of appeals be reversed.

C. The Interpretation Of The Court Of Appeals Is Unreasonable And Should Be Reversed.

By itself, the failure of the court of appeals to show that the Commission's interpretation of the NGPA is unreasonable is sufficient grounds to reverse that court's decision.[32] However, reversal is particularly appropriate here because the court of appeals' own interpretation is unreasonable. The court of appeals offers only its own speculations to support its improbable conclusion that Congress implicitly intended ceiling prices be applied to inaccurately measured deliveries of gas energy.[33]

First, the court of appeals muses that "the wet rule establishes the only method of measuring Btu's with which Congress was *likely* to have been familiar"[34] because it was the rule used by the Commission in regulating prices of producers' sales of gas in interstate commerce for resale under the Gas Act. This assertion has no foundation. Under the NGPA, Congress "extended federal price regulation to the intrastate gas market" for the first time.[35] Similarly, the NGPA regulates for the first time the prices charged in producers' direct sales to consumers in interstate com-

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[32] "[The Court] need only conclude that [the Commission's interpretation] is *a* reasonable interpretation of the relevant provisions" to uphold it. *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, Nos. 82-34, *et al.*, slip op. at 20 (May 16, 1983) (emphasis in original).

[33] App. 26a-33a.

[34] App. 26a (emphasis added).

[35] *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, No. 81-1370, slip op. at 4 (January 24, 1983).

merce. Before the effective date of the NGPA, the parties to such unregulated sales provided, by contract, the procedure for calculating the Btu content of gas sold. There is no basis for assuming that Congress intended to adopt implicitly the Commission's practice with respect to interstate sales for resale previously regulated under the Gas Act rather than to adopt the industry practices in the previously unregulated markets, to which the Commission's Gas Act regulations had no applicability.

Second, the court of appeals speculates that there is a "*likelihood* that Congress *may well have assumed* that the 'Mcf' and 'MMBtu' bases of natural gas pricing were far more interchangeable than the Commission realized. . . ."[36] In the NGPA, Congress specifically and separately defines and uses the terms "Mcf" and "Btu".[37] The former is a unit of volume and the latter a unit of energy. Congress demonstrated it knew the difference by its separate and distinct use and definition of the terms, selecting the unit of energy as its pricing unit and using the unit of volume for other purposes.[38]

Third, the court of appeals characterizes the Commission's dry rule as "hyper-accurate" and unjustified because Congress "was *not necessarily* adverse to the use of 'standard' assumptions underlying the wet rule".[39] As an example of Congress' use of standard assumptions the court of appeals referred to the Energy Tax Act of 1978

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[36] App. 29a (emphasis added).

[37] 15 U.S.C. §§ 3301(29), (30).

[38] For example, Congress utilized the volumetric unit, Mcf, to specify the production threshold for stripper wells but utilized the energy unit, "MMBtu," to set the stripper-well ceiling price. 15 U.S.C. §§ 3318(a), (b)(1).

[39] App. 31a (emphasis added).

("ETA").[40] App. 30a-31a. This reference is misplaced. The court of appeals relies on provisions that were contained only in a House version of that legislation.[41] However, the ETA, as enacted, does not contain these provisions. Thus, the ETA provides no support for the court of appeals' interpretation of the NGPA.

In sum, the court of appeals' decision is based on speculation and a misreading of the statute and its legislative history. The decision provides no basis for vacating the Commission's reasonable interpretation of the NGPA.

II. In Vacating The Commission Orders In This Case, The Court Of Appeals Erred In Disregarding The Authority Vested In The Commission By Congress Under The NGPA.

The court of appeals concluded that neither the statutory language nor the legislative history of the NGPA expressly mandated use of either the "wet" or "dry" measurement rule.[42] If the court of appeals were correct on this point, that court erred in proceeding to interpret the NGPA as requiring the Commission to preserve the uncorrected "wet rule" on the basis of the court's view that it was "logical" to "assume" that this result was intended by Congress.[43] If the issue were left unaddressed by Congress, the court of appeals was obligated to leave resolution of the issue to the Commission.

The court of appeals' decision rests on its conclusions that Congress had not delegated to the Commission "the choice of methodologies or definitions," and the Commission "was given 'no independent authority under the NGPA

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[40] Pub L. No. 95-618, 92 Stat. 3174-3205 (1978).

[41] H. R. Rep. No. 95-496, Part III, 95th Cong., 1st Sess., 97 (1977).

[42] App. 22a-23a.

[43] App. 22a-23a, 32a-33a.

to define "Btu" ' ".[44] These conclusions are contrary to the explicit administrative and definitional authorities which Congress conferred on the Commission by Sections 501(a) and (b) of the NGPA,[45] and conflicts with decisions of this Court construing similar provisions of the Gas Act and Federal Power Act.[46]

In the NGPA, Congress specifically authorized the Commission to resolve technical issues which Congress left unresolved. Section 501(a) of the NGPA specifically empowers the Commission to administer and to enforce the NGPA[47]. In addition to this general authority, Section 501(b) authorizes the Commission "to define, by rule, accounting, technical, and trade terms used in [the NGPA]."[48]

The Conference Committee Report confirms the breadth of the Commission's authority under Section 501:

> The conference agreement provides definitions for several terms. The conferees have provided the Commission authority to define additional terms as necessary for the purpose of implementing this Act under the authority provided in [Section] 501(b). *The conferees also provide the Commission authority to refine definitions of terms provided in the Act in a manner that is consistent with the definitions provided.*[49]

This explanation confirms that Sections 501(a) and (b) empower the Commission to administer the NGPA and to

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[44] App. 32a.

[45] 15 U.S.C. §§ 3411(a) and (b).

[46] Sections 501(a) and (b) of the NGPA are similar to Section 16 of the Gas Act (15 U.S.C. § 717o) (App. 184a) and Section 309 of the Federal Power Act (16 U.S.C. § 825h) (App. 187a).

[47] 15 U.S.C. § 3411(a).

[48] 15 U.S.C. § 3411(b).

[49] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess., 69 (1978) (emphasis added).

adopt the two-step procedure set forth in Order Nos. 93 and 93-A which accurately determines the Btu content of natural gas at actual delivery conditions. Here the Commission has exercised its statutory authority by taking the reasonable and common-sense step of "refining" the definition of "Btu" set forth in the NGPA[50] so as to make explicit that the pricing unit is not to be altered by reason of inaccurate measurement methodologies.

The court of appeals overstepped its role as a reviewing court in vacating the Commission's reasonable action. As this Court has previously held, under the Gas Act, "Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts."[51] A reviewing court may not supplant the Commission's decision "'with one more nearly to its liking'...."[52]

The court of appeals provides no basis for its decision to interfere in the Commission's exercise of its statutory authority. If, indeed, Congress were silent on the question of Btu content measurement, it was not silent on its intent that the Commission was to implement the technical details of the NGPA.

Where Congress has not provided express guidance, this Court has admonished that a reviewing court must not simply substitute its judgment for that of an agency after a fruitless "section-by-section search" for express guidance in the "literal words of the statutory provisions."[53] It is not a "reasonable canon of interpretation" that a legisla-

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[50] 15 U.S.C. § 3301(30).

[51] *Permian Basin Area Rate Cases*, 390 U.S. at 767.

[52] *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 308; *accord, e.g.*, *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517-519 (1979).

[53] *American Trucking Associations* v. *United States*, 344 U.S. 298 309-10 (1953).

ture can provide specific guidance on every detail. Rather, the absence of such detail

> is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislature cannot be expected to possess.[54]

This Court, in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*,[55] has previously cautioned courts of appeals against usurping administrative authority:

> The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. . . . Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, . . . not simply because the court is unhappy with the result reached.[56]

In reversing the Commission's interpretation of the NGPA, the court of appeals has acted contrary to these principles and substituted its view for that of the Commission. In doing so, the court of appeals overstepped the bounds of its reviewing authority under Section 506 of the NGPA,[57] and "usurped an administrative function."[58]

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[54] *Id. at* 310 (citations omitted).

[55] 435 U.S. 519 (1978).

[56] *Id.* at 558.

[57] 15 U.S.C. § 3416.

[58] *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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